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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-74

ALLEN CONQUE,

Petitioner,

versus

HAROLD GAUTHE, ET AL,

Respondents.

PETITION ON BEHALF OF ALLEN CONQUE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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IN THE
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No.

ALLEN CONQUE,
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PETITION ON BEHALF OF ALLEN CONQUE FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

TO THE HONORABLES, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

This is an application for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, as to its per curiam decision rendered on March 14, 1975, timely rehearing denied on April 15, 1975, affirming a decision of the United States District Court, Western District of Louisiana, whereby petitioner's Section 1983 action for injunctive relief was dismissed on motion for summary judgment. Neither decision is officially

reported in the federal case reporter system. The per curiam decision of the Court of Appeals is reproduced in the Appendix at Page 1a-2a. The rulings of the District Court likewise are reproduced in the Appendix at Pages 3a-15a.

JURISDICTION

This application for a writ of certiorari invokes the jurisdiction of the court pursuant to 28 U.S.C.A. 1254; 28 U.S.C.A. 2101 and Supreme Court Rules 19, et seq.

QUESTIONS PRESENTED

The essential issues of law presented by this application are:

(a) Can state officials, while acting under color of state law remove and/or demote a nontenured teacher, employed in the public school system, without a hearing or an opportunity for a hearing, where the removal and/or demotion is based upon scandalous and defamatory accusations, which impute insubordination, incompetency, unprofessionalism and moral turpitude to the teacher?

(b) Alternatively, can state officials, while acting under color of state law, remove and/or demote a tenured teacher, employed in the public school system without a hearing or an opportunity for a hearing, where applicable state laws proscribe such removal and/or demotion without a hearing?

CONCISE STATEMENT OF THE CASE

For more than three years preceding the wrongful conduct mentioned in his complaint, petitioner was a teacher of general science in the public school system of Louisiana employed by the Lafayette Parish School Board and discharged his duties as such in Lafayette Parish, Louisiana. According to the Teachers' Tenure Act of Louisiana (LSA-R.S. 17:441, et seq.) each teacher must serve a probationary term of three years to be reckoned from the date of his first appointment in any parish in the State of Louisiana. In the absence of discharge during such probationary period, the teacher automatically becomes a regular and permanent teacher. Such a permanent teacher cannot be removed from his position except upon written and signed charges, and then only if found guilty after a hearing conducted by the school board of the parish or the city, as the case may be. At any such hearing the teacher is entitled to have witnesses testify on his behalf and to the assistance of counsel and also enjoys the right of appeal to a court of competent jurisdiction. *Petitioner was such a tenured teacher at all times material to his lawsuit.*

As a concomitant part of his duties as a teacher, petitioner was employed and functioned as assistant coach during the 1972-73 school session. He was paid the sum of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month for his services as assistant coach in addition to the compensation which he received as a teacher of general science. *No person functions as a coach in the public schools unless he is a certified teacher.*

On June 1, 1973, Allen A. Dugas, principal of the Carencro High School where petitioner discharged his duties as teacher and coach, addressed a letter to Harold Gauthe, superintendent of education of Lafayette Parish and executive officer of the Lafayette Parish School Board, concerning petitioner, requesting petitioner's removal as head track coach. Forasmuch as the letter forms the gravamen of the complaint against petitioner for which he was dismissed as coach, the entire letter is essential to the establishment of the proper framework of consideration of the issues presented by this application.

This letter reads as follows:

"Dear Mr. Gauthe:

"Below are pertinent facts in relation to the coaching situation at Carencro High School.

"I was appointed Principal at Carencro High commencing school year 1965-1966. During the following two (2) years problems in the coaching department began to develop.

"This problem has existed at Carencro High for the past seven (7) years. Constant friction has been commonplace between the athletic directors (Roy Veazey and Jerry Griffith) and Head Track Coach George Allen Conque. In my opinion Conque has had just one aim in all these years and this has been to work only with track. He has stopped at nothing to (and has even stated this several times) just work

with track. This friction under two (2) Athletic Directors (both at the old school and then into the new) has worsened over the years even though several conferences were held to try to remedy the situation. A coaching staff must work closely together. It must be a close knit group. By working in this manner he has isolated himself to the detriment of the whole coaching staff.

"At the new school more problems arose when Roy Veazey resigned and Coach Jerry Griffith and Conque were candidates for the position of Head Coach. Tremendous political pressure was applied by the Conque family even to the father calling me and making threats to break my recommendation. Conditions worsened after Coach Griffith was appointed to the job. Since that time Conque has not ceased in his efforts to do anything which would enhance his image and attempt to destroy the other sports programs at Carencro High.

"1. He has had parents involved in his problems in coaching.

"2. He has used students whenever necessary to fight his battles.

"3. He has gone to students and discussed decisions made by the administration.

"4. He has disobeyed direct orders issued by the administration. An example of this is his giving his keys to students to go into the boys' gym without a supervising coach being there. I have personally obtained his keys from students (his son mainly) who had them to get into the gym.

"5. He and his supporters never ceased in issuing statements even after an agreement was reached in March of 1972 that an attempt would be made to work things out.

"Following is a list of items observed by the school principal citing dates and names:

"1. February 25, 1973 — Gave cigarettes to Buster Dupuis, supposedly for Buster to throw away. Buster, when called to the office for discipline situation, claimed he was not told to throw them away. He stated that the cigarettes were offered to him and he took them.

"2. In a disagreement between Coach Bob Fabre and student Blayne Brasseaux on February 28, 1973, Conque told Blayne to go to the principal's office and that he, Conque, had witnesses that Coach Fabre had pushed the student first. Very unprofessional.

"3. Told students in track that we were going to fire him at the end of the year. Student Doyle Moody questioned us about it. Caused bad feelings among athletes. This was week of February 24, 1973.

"4. March 5, 1973 — Permitted Student Karl Schexnayder (whose family strongly supports Conque) to practice track. Claims he did not know Karl was suspended for fighting. There is no way he could not know.

"5. Wednesday, March 8, 1973 — Left class (3rd hour general science) unsupervised and went home supposedly to take medicine. Conque stated to Assistant Principal Fourcade that Miss Charlene Sellers, math teacher in an adjoining room, was asked to supervise the class. Miss Sellers denied this. When the class was checked by me I found it to be extremely noisy and erasers were being thrown by students at each other. I talked to Conque about this situation and he stated Miss Laurette LaBarre was asked to supervise the class when he left. Miss LaBarre denied this.

"6. Repeatedly does not store athletic equipment after usage.

"7. Student Chuck Comeaux came to talk to me about his grade in general science. He said Conque was partial. Gave grades to others and chances to make up tests to others but not to him. In conference Conque agreed to give him another chance. This was Conque's decision. When Chuck made up the work Conque refused to consider the work. Conque said he had changed his mind and just wanted to prove to the boy that he could do the work. I told Conque I disagreed with him on procedure.

"8. Purchased $100 of trophies for a practice track meet of March 16, 1973, without a purchase order (or discussing this matter with the athletic director). Conque was told as other teachers were told about use of purchase orders. This meet was re-scheduled for Sunday March 18, 1973. Athletic Director Griffith told Conque no trophies because it was a dual meet. Trophies were given regardless. No team points and no winner declared.

"9. Randy Broussard, 9th grader, was on the Junior varsity team. He was removed for missing practice. Without discussing why with Coach Fabre, Junior Varsity Coach, he was placed on the Varsity Squad.

"10. Coach Conque has been signing my name to eligibility lists for track boys. This was done in 1972 as well as 1973. I signed some. He signed others. Claiming he thought it was all right. These lists are required by the State Athletic Association.

"11. For state meet on May 11, 1973 left at 12:20 with five (5) students who participated. Took along one son who did not participate and at least one other student (Kevin Cormier) who was not excused nor was he a participant.

"12. Left school without permission on May 15, 1973 at 3:15 P.M. Teachers are sometimes given permission to leave early when requested. I talked with the Head Coach,

Assistant Principal and no permission requested.

"13. Coaches are instructed never to leave students in gym when coaches not there. A faculty meeting was called. Head Coach and assistant locked gym to attend meeting. This was May 24, 1973. Coach Conque permitted track boys to dress out in gym by themselves while meeting was on.

This situation has lead to a definite division of the coaching staff and the student body. I have held several conferences with the coaches and individual conferences with Conque. This as well as meeting with members of the School Board at a special meeting in March of 1972 and several meetings with the Superintendent did not help as many of the situations described above occurred and the situation worsened.

"In view of the above stated facts and as I have already stated in previous letters it is my recommendation that George Allen Conque be removed as Head Track Coach at Carencro High School.

Sincerely,
/s/ ALLEN A. DUGAS
Allen A. Dugas, Principal"

Responding to Dugas' written complaint, on June 22, 1973, Superintendent Gauthe acting with the authority and approval of the Lafayette Parish School Board members, ordered the removal of petitioner as coach "due to your apparent incompatibility to function as a member of the total coaching staff and your sometime *insubordinate* attitude and upon the *recommendation of the principal of Carencro High School* * * *."

Upon notice of his removal petitioner, invoking 42 U.S.C. Sections 1983 and 1988, et al, instituted an action in the United States District Court seeking injunctive relief and reinstatement. In his complaint, (See Appendix, Pages 16a-24a) petitioner asserted that his discharge was "based upon false and scandalous allegations" damaging to his "reputation as a person and as a member of the teaching profession, involving questions of moral turpitude, insubordination, unprofessionalism and professional incompetence". He complained that defendants had "willfully accepted the scandalous ex parte statements" lodged against him "without regard to the truthfulness thereof and without making reasonable inquiry as to the verity" of the statements. Petitioner further stated that "defendants refused to conduct a hearing or even to extend to complainant an opportunity for a hearing for the purpose of determining the truthfulness or not of the scandalous accusations and assertions" made against him. "Contrariwise," petitioner further asserted, "defendants herein by concerted and unilateral action adjudicated your complainant guilty of the scandalous conduct aforesaid and thereupon condemned your complainant as professionally unfit and unqualified

for the position of assistant coach of Carencro High School and dismissed him and removed him from said position and simultaneously deprived him of his income of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month." Petitioner finally complained that he had been deprived "of his right of employment and of his right to a good professional repute without any valid reason whatever, without any hearing, and without giving him the opportunity to be heard and to defend against the scandalous charges" in violation of his due process rights.

In due course defendants filed a motion to dismiss. Plaintiff filed a motion for summary judgment as to the relief requested in numbered paragraphs 3 and 4 of the prayer of his complaint (See Appendix, Page 25a). The District Court overruled defendants' motion, but deferred ruling on plaintiff's motion pending receipt of further information from defendants (See Appendix, Page 3a-7a). Thereafter, defendants filed a motion for summary judgment. The respective motions of the parties were supported by the parties' respective affidavits. The thrust of the defendants' affidavits left no doubt that the scandalous accusations leveled against petitioner by School Principal Dugas were taken into consideration as a basis for petitioner's removal as assistant coach. For example, the joint affidavit of defendants Clause, Broussard, Aucoin, Baranco, Bonnet, Boudreaux, Chaisson and Lastrapes (school board members) in part asserts: (See Appendix, Page 26a-28a)

> "Their vote to sustain the superintendent's recommendation to relieve Mr. Conque of his

coaching duties was based upon Superintendent Gauthe's recommendation as contained in his letter of June 22, 1973. * * *"

Superintendent Gauthe's letter of June 22, 1973, expressly states that plaintiff's removal as assistant coach is based "upon the recommendation of the principal of Carencro High School." The "recommendation" referred to is contained in principal Dugas' letter of June 1, 1973, which, after reciting the scandalous accusations against plaintiff in thirteen (13) numbered paragraphs, concludes as follows:

"In view of the above *stated facts* and as I have already stated in previous letters, it is my recommendation that George Allen Conque be removed as head track coach at Carencro High School."

In opposition to defendants' motion and in support of his own, plaintiff affirmatively stated in his affidavit: (Appendix, Page 29a-33a)

"* * * That defendants herein willfully accepted the scandalous ex parte statements of said Dugas and others unknown to your affiant without regard to the truthfulness thereof and without making reasonable inquiry as to the verity of the scandalous statements made against affiant. Affiant further states that said state officials refused to conduct a hearing or even to extend to affiant an opportunity for a hearing, though affiant requested the same, for the purpose of determining the truthfulness or not of the scandalous allegations and accusations asserted against your affiant, notwithstanding that one of the members of the school board, Mr. Preston J. Babineaux, made a formal motion requesting that said scandalous accusations be the subject of formal inquiry and full hearing by the Lafayette Parish School Board.

"Affiant further stated that the scandalous allegations and accusations mentioned herein above are not true. As a result of said discharge, your affiant was removed from the position of assistant coach, which formed part of his status as a teacher, and also was deprived of the sum of $133.33 per month since July 1, 1973, and has continuously been deprived of said income as the result of the wrongful conduct of defendants in connection with the captioned matter."

RULINGS OF DISTRICT COURT

In rejecting defendants' motion to dismiss, the District Court, relying upon *Perry v. Sinderman*, 408 U.S. 593, and *Board of Regents v. Roth*, 408 U.S. 564, held:

"In this case, the letter addressed by Dugas to the Superintendent of Schools levels a number of charges against plaintiff, which if they were in fact the basis for his dismissal as assistant coach, would bring him within the Fourteenth Amendment's procedural protec-

> tion of his liberty as that term is employed in this provision of our basic law."

Notwithstanding *Sinderman* and *Roth*, supra, and the undisputed scandalous nature of the charges employed as a basis to remove petitioner, the District Judge granted summary judgment to defendants and dismissed petitioner's action. In so doing, the District Judge reasoned that "this case does not involve questions of race, sex, or religion. There is no showing whatsoever of any purposeful discriminatory act by any board member individually, and suit against the board itself will not lie," though no such questions were ever urged at any time by petitioner. In speaking to *Sinderman* and *Roth*, supra, the District Judge further held, "It is clear that not all rights to liberty enjoyed by citizens in public employment are protected by the due process clause of the Fourteenth Amendment. It is where the State action is such as to label the individual with a 'badge of disgrace; under charges against him of dishonesty or immorality, habitual drunkenness or similar stigma of a degrading and debasing nature that due process must be afforded even to nontenured employees. * * * That this is not the case here is demonstrated by the fact that Mr. Conque is retained even today as a class room teacher of general science at Carencro High School." Based upon such a rationale, petitioner's action was dismissed.

DECISION OF COURT OF APPEALS

It is pertinent to emphasize that up to this point in time petitioner, though removed from public employment as assistant coach upon the basis of scandalous

accusations, was granted a hearing neither by the State officials who so removed him nor by the District Court to which he applied for redress. Petitioner's denial of any hearing as to the scandalous accusations against him was not to end at the District Court level. He was similarly denied of a hearing before the Court of Appeals, Fifth Circuit.

On March 6, 1975, after his appeal was duly lodged with the appellate court, acting pursuant to local Rule 18, the court transferred his appeal to the summary calendar for disposition. Under such a procedure, no oral arguments are permitted and the case is disposed of on the briefs submitted by the parties.

In a short per curiam opinion, the appellate court adopted the rationale of the District Judge. In so doing the court said:

(See Appendix, Page 1a-2a)

> "Judge Putnam found that Conque had no property right at stake in his position as coach because he had neither tenure in that position nor expectation of continued employment. Moreover, the 'scandalous and defamatory accusations' were not such as to deprive him of liberty. That factor is clear from his continued employment as a science teacher in Carencro High School. * * *"

Accordingly, the judgment of the District Court was affirmed.

Thus the courts below looked to the "weight" rather than to the "nature" of the interest at stake in denying petitioner's due process claims. In so doing, the lower courts went contrary to the decisions of *Board of Regents v. Roth*, supra, and *Goss v. Lopez*, 95 S.Ct. 729.

SUMMARY OF ARGUMENT

There is no substantial dispute over the fact that petitioner's removal as assistant coach at Carencro High School was based upon scandalous accusations detrimental to his personal and professional repute. There is no substantial dispute over the fact that his removal was brought about without a hearing as to the accusations and without having given to petitioner an opportunity to deny these accusations. "Where a person's good name, reputation, honor, or integrity are at stake because of what government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 91 S.Ct. 507. Defendants failed to grant petitioner a hearing. It is no defense, to a charge of a denial of a hearing in such a circumstance, that the victim is not subjected to a severe detriment or grievous loss. In determining whether due process requirements apply, the courts "must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents v. Roth*, 92 S.Ct. 2701; *Goss v. Lopez*, 95 S.Ct. 729. Petitioner's dismissal, therefore, exists in violation of his constitutional liberty. The decision of the appellate court, therefore, must be reversed.

Alternatively, petitioner contends that he is a tenured teacher and that his position as assistant

coach is a concomitant part of his professional position. No alteration in that position, including any deduction in salary, may be brought about by state government action, without cause and without a hearing. The alteration in his position and the consequent deduction in his salary, without a hearing, constitutes a demotion in his professional status proscribed by state law. *Aswell v. Jackson Parish School Board*, 176 So.2d 741. Thus as a matter of state law, petitioner was entitled to a hearing as to the cause of his firing. The denial of such a hearing constitutes the denial of constitutional equal protection.

ARGUMENT

(a) Petitioner Has Been Denied of Procedural Due Process

There exists no genuine issue as to the fact that petitioner was a tenured teacher of general science in the public school system of Louisiana and as a concomitant part of his teaching duties he was an assistant coach. As assistant coach he was entitled to receive and did receive ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS a month. He was removed from his position as assistant coach effective July 1, 1973, with the consequent loss of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month. Thus, his removal has brought about forfeiture of his property right to ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS a month.

This removal was brought about by the concerted action of the defendants, and it appears undisputed (or at worse there exists a genuine issue of fact) that petitioner was removed from his position, without a hearing, based upon scandalous accusations imputing insubordination, incompetency, unprofessionalism and moral turpitude to him. Principal Dugas' accusations are scathing and direct. For example, in numbered paragraph 4 of his letter he states, "He has disobeyed direct orders issued by the school administration," thus emphatically charging insubordination. In numbered paragraph 10 he charges, "Coach Conque has been signing my name to the eligibility list for track boys," thus imputing dishonesty. In numbered paragraph 1 he charges that Conque, "gave cigarettes to Buster Dupuis" a minor, thus accusing Conque of contributing to the delinquency of a minor. In numbered paragraph 2 Dugas accuses Conque of being "very unprofessional." In numbered paragraph 5 Dugas speaks of Conque's leaving his class unsupervised, saying, "I talked to Conque about this situation and he stated that Miss Laurette LaBarre was asked to supervise the class when he left. Miss LaBarre denied this," thus branding Conque as a liar. Conque stood thus accused at the time of his removal as assistant coach. He was removed without a hearing. His removal is the equivalent of his conviction of the charges lodged against him. There is at stake in this litigation, therefore, petitioner's honor, reputation, and integrity as a teacher and as a person.

"Where a person's good name, reputation, honor or integrity is at stake because of what government is doing to him, notice and an opportunity to be heard are

essential." *Wisconsin v. Constantineau*, 91 S.Ct. 507, 510; *Board of Regents v. Roth*, 92 S.Ct. at p. 2707; *Goss v. Lopez*, 95 S.Ct. at p. 736. "The Fourteenth Amendment, as now applied to the states, protects the citizen against the state itself and all of its creatures * * * boards of education not excepted." *West Virginia v. Barnette*, 63 S.Ct. 1178, 1185; *Goss v. Lopez*, 95 S.Ct. at P. 736.

The Fourteenth Amendment allows for no wooden distinction among the occupations of citizens whose rights are infringed by the state or its officers. "A state cannot exclude a person from the practice of law or *from any other occupation* in a manner or for reasons that contravene the due process or equal protection clause of the Fourteenth Amendment." *Schware v. Board of Bar Examiners of the State of New Mexico*, 77 S.Ct. 752, 756. Thus, the suggested bifurcation of petitioner's employment into that of a teacher and that of an assistant coach is of no significance in terms of petitioner's due process rights as to his property and his liberty. His function as assistant coach, even if it may legally be divorced from his function as teacher, nevertheless exists as a remunerative occupation. He was employed by the State of Louisiana to engage in that occupation. Louisiana agreed to pay him ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS each month for his services in the pursuit of that occupation. This occupation brought him in daily contact with students of Carencro High School. As such he was entrusted with the guidance and development of those students participating in the sporting activities which he coached. Thus his good name, reputation, honor and integrity were just as

valu ble and important to him as coach as they were to him as teacher. Where a person's good name, reputation, honor or integrity is at stake because of what government is doing to him, "the minimum requirements of the [due process] clause must be satisfied." *Goss v. Lopez*, 95 S.Ct. at p. 736. The State of Louisiana, acting through officers of the Lafayette Parish School Board failed to satisfy the minimal requirements of the due process clause in removing petitioner as assistant coach.

> "Fairness can rarely be obtained by secret, one-sided determination of the facts decisive of rights . . . secrecy is not congenial to truth-seeking and self-righteousness gives to slander an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Trust Committee v. McGrath*, 71 S.Ct. at 649 (Frankfurter, J. concurring).

Petitioner has been stigmatized with a badge of infamy. This stigma has been inflicted upon him without the opportunity to be heard or to refute the scandalous charges giving rise to his removal. Such conduct offends against petitioner's due process rights and must be enjoined.

The rationale of the lower courts to the effect that petitioner was not denied of his liberty, notwithstanding the endemic scandalous nature of the accusations against him, because those who have offended him

have continued him in his employment as a science teacher, instances but the wrongful application of the de minimis theory of constitutional law. Such a postulate is not only at war with petitioner's federally secured rights, but as petitioner observed in his application for rehearing, is equivalent to saying that a benevolent tyrant is guilty of nothing for having wounded his subject, simply because he elects not to strike the fatal blow. The fact that the defendants, who have publicly degraded him and on that account deprived him of a portion of his income and removed him as coach, have elected to continue him in his employment as a science teacher does not operate to erase the scandalous accusations made against him nor to rectify his good name, reputation, honor or integrity which they have consummately besmirched. In short the *nature* of the offense against petitioner is not in the least altered by his continued employment as a science teacher, however much one may debate the mitigating weight which the continuance of the employment as a teacher might have upon the damage sustained by petitioner. The fact remains that he has been charged and convicted without a hearing of insubordination, incompetency, unprofessionalism, and moral turpitude. Such a badge of infamy may not be considered de minimis and may not be inflicted in complete disregard of the due process clause. *Goss v. Lopez*, supra.

A similar contention was urged upon the court in *Goss*. There the court was dealing with due process claims of high school students who had been suspended from school for ten days without a hearing for their alleged involvement in a disturbance on school

premises. In urging the de minimis postulate, school officials argued that "the loss of ten days, it is said, is neither severe nor grievous and the due process clause is therefore of no relevance." In rejecting the argument the court held: (95 S.Ct. at P. 737)

> "Appellee's (sic) argument is again refuted by our prior decision; for in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the interest at stake.' *Board of Regents v. Roth*, supra, at 570-571, 92 S.Ct. at 2705-2706. Appellees were excluded from school only temporarily, it is true, *but the length and consequent severity of a deprivation*, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. *Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556 (1972). The Court's view has been that as long as a property deprivation is not de minimis, *its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (Harlan, J., concurring); *Boddie v. Connecticut*, 401 U.S. 371, 378-379, 91 S.Ct. 780, 786, 28 L.Ed.2d 113; *Board of Regents v. Roth*, supra, 408 U.S. p. 570 n. 8, 92 S.Ct. p. 2705. *A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.*

> "A short suspension is of course a far milder deprivation than expulsion. But, 'education is perhaps the most important function of state and local governments.' *Brown v. Board of Education*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873, (1954), and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. *Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.*"

Obviously if a ten day suspension from school is not de minimis, the complete removal of a coach from his position with a consequent loss of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS a month cannot be considered de minimis, especially where the removal is accompanied by the pervasively scandalous charges involved in petitioner's situation. The decision of the appellate court holding otherwise is contrary to *Goss* and instances a misapplication of the *Roth* principle as elaborated by *Goss*.

The Eighth Circuit decision in *Wilderman v. Nelson*, 467 F.2d 1173 exemplifies the more acceptable view of the meaning of *Board of Regents v. Roth*, supra. In that case Wilderman was discharged as a welfare case worker for the Missouri division of public welfare without a hearing. He sought reinstatement and

damages. The decision to dismiss him was "based on your attitude towards the agency and the administration of the St. Louis City Welfare Office." This decision was supplemented by a letter forwarded to other welfare officers which stated that Wilderman carried out agency policies with "much criticism" and that his termination resulted from his "inability to accept the rules and regulations of the agency within the structure in which he was working." Wilderman contended that the decision and the letter constituted a stigma that might foreclose future opportunities to practice his chosen profession. The lower court summarily dismissed the complaint. On appeal, however, that decision was reversed. In reversing the court held that "the record here does not establish beyond doubt that the steps taken by the State of Missouri in discharging Wilderman did not infringe upon his liberty." (467 F.2d at P. 1176)

The stigma in *Wilderman* pales in comparison to the stigma that has been inflicted upon petitioner by defendants. If *Wilderman* is correct law, then the decision of the Court of Appeals, Fifth Circuit, must be reversed.

(b) Petitioner Has Been Denied Equal Protection of State Laws

On July 1, 1973, the effective date of petitioner's removal as assistant coach, petitioner was a permanent teacher within the contemplation of LSA-R.S. 17:443. As such he could not be removed from his position "except upon written and signed charges * * * and then only if found guilty after a hearing by the school

board of the parish or city as the case may be, which hearing may be private or public, at the option of the teacher." While defendants claim in their affidavits and in argument that they have only "transferred" plaintiff to another position, the undisputed fact remains that they have removed him as assistant coach. His removal as assistant coach has resulted in a demotion of petitioner in both position and pay. Such a demotion constitutes a removal within the meaning of R.S. 17:443. Such a removal, therefore, cannot be accomplished except upon written and signed charges "and then only if found guilty after a hearing by the school board of the parish." *State, ex rel McNeal v. Avoyelles Parish School Board*, 199 La. 859, 7 So.2d 165 1942). In *McNeal* the school board involved had demoted McNeal from the position of principal to that of teacher and reduced his salary from $190.00 per month to $129.00 per month. The action was taken without written assigned charges and without a hearing. On appeal the Louisiana Supreme Court verbalized the issue presented in these words: (7 So.2d at P. 166)

> "* * * The narrow issue presented to us for determination is whether the Avoyelles Parish School Board had the legal right to demote the relator from the position which he held and assign him to another teaching position in the high school at a lesser salary without complying with the provisions of Section 48 of the Teachers' Tenure Statute as amended by Act No. 58 of 1936. The pertinent portion of that section reads as follows:

" 'No permanent teacher shall be removed from office except upon written and signed charges of willful neglect of duty, or of incompetency, or dishonesty, and then only if found guilty after a hearing by the school board of that parish in which the teacher is employed;* * *' "

The school board contended that it had simply demoted McNeal and, therefore, he was not entitled to a hearing. The school board's position was articulated by the court in these words: (7 So.2d at P. 166)

"The School Board admits, in the instant case, that McNeal was demoted from his position as principal to the position of teacher at a lesser salary without any written charges being filed against him as provided by the above quoted section. It maintains, however, that the section is inapplicable because the words 'removed from office' as used therein contemplate only an outright dismissal of the teacher and not a change to a lesser position coupled with a reduction in salary."

The Louisiana Supreme Court rejected that contention holding that removal as used in the statute in question "included a demotion in office by assigning the employee to a lower position in the same service at a lower rate of compensation." Adverting to its earlier decision on the same question, the court further observed: (7 So.2d at P. 167)

" 'It may be added that an indefinitive suspension without pay simply amounts to a removal and that a demotion, so far as it carries with it a reduction of salary, is only an indirect method of attaining the same end. For, if a civil service employee may be 'demoted' once and his salary thus substantially reduced, he may of course be 'demoted' again and his salary still further reduced, or (say) until it vanishes altogether.' "

This decision was followed by *Aswell v. Jackson Parish School Board*, 176 So.2d 741 (1965) decided by the Court of Appeal for the Second Circuit of Louisiana. Teacher Aswell was "transferred" by the school board from the "principalship at the Quitman High School to Director of Guidance Services and Supervisor of Adult Education on a 12-month basis at the same salary he received as Principal effective August 31, 1964." The defendant school board contended that the transfer did not constitute "either a demotion in professional status or a reduction of salary, and, therefore, was not prohibited by the provisions of the Teachers' Tenure Act." While there was not a reduction in salary as conceded by Aswell, the uncontradicted evidence was that Aswell was not possessed of the required qualifications for the position to which he was transferred and consequently "it will be necessary for him to return to school for further study in order to acquire the number of 'points' or 'credits' which would permit him to hold such position on a permanent basis." The court then observed that the transfer "imposed a burden which was not necessary to the continuance of his former position" and con-

cluded, therefore, that the transfer indeed constituted a demotion or change in status that could not be effectuated without a hearing as contemplated by the Teachers' Tenure Act.

The removal of Mr. Conque from his position as coach constituted a demotion "so far as it carries with it a reduction of salary" (*McNeal*, 7 So.2d at P. 167) and thus constitutes a removal within the meaning of the Louisiana Teachers' Tenure Act. Such a removal or demotion could be accomplished by defendants only by the filing of written charges and the conducting of a hearing at which "the teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at the said hearing" pursuant to LSA-R.S. 17:443. Defendants singularly failed to prefer written charges and to conduct such a hearing. In so doing, they have deprived Mr. Conque of the equal protection of state laws in violation of the provisions of the Fourteenth Amendment.

In addressing itself to the meaning of the phrase "equal protection of laws," the court in *State of Missouri ex rel Gaines v. Canada, et al*, (1938), 59 S.Ct. 232, 236, 237, 305 U.S. 337, said: "The equal protection of the laws is 'a pledge of the protection of equal laws'. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 1070, 30 L.Ed. 220. Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental enti-

ties, — each responsible for its own laws establishing the rights and duties of persons within its borders. * * *"

Again in *Skinner v. State of Oklahoma* (1942), 62 S.Ct. 1110, 1113, 316 U.S. 535, the court further observed:

> "* * * The guaranty of 'equal protection of the law is a pledge of the protection of equal laws.' *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 1070, 30 L.Ed. 220. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."

Forasmuch as petitioner's right to employment has been denied by defendants in violation of petitioner's constitutional right to equal protection of state laws, his removal from office is, therefore, null and void and his reinstatement must be ordered.

CONCLUSION

Petitioner respectfully requests that this court reverse the judgment of the Court of Appeals, Fifth Circuit, and grant summary judgment in his favor enjoining defendants from continuing and/or maintaining his removal and dismissal as assistant coach of Carencro High School without a meaningful hearing as contemplated by the Due Process Clause of the Fourteenth Amendment, and further commanding and directing defendants to reinstate petitioner as assis-

tant coach of Carencro High School, Louisiana, retroactive to the date of his wrongful dismissal or removal, i.e., July 1, 1973, together with all of the emoluments, rights and privileges including compensation due from July 1, 1973, at the rate of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS a month and to continue him in his capacity and in his prior employment thereafter subject to removal only for valid cause and after a meaningful due process hearing; alternatively, that this cause be remanded to the lower court with direction to grant petitioner injunctive relief and reinstatement with back pay as prayed for or that a hearing on the merits be conducted for the purpose of adjudicating petitioner's claim to injunctive relief and reinstatement with back pay as prayed for.

Respectfully submitted,

J. MINOS SIMON, LTD.
Attorney for Petitioner
1408 Pinhook Road
Post Office Box 52116
Lafayette, Louisiana 70501
AC #318-234-3263

_____

J. MINOS SIMON

CERTIFICATE OF SERVICE

I, J. Minos Simon, counsel for petitioner in the foregoing application for writ of certiorari to the United States Court of Appeals, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of July, 1975, I served a copy of the foregoing petition for writ of certiorari on Mr. John F. Ward, counsel of record for defendants, by mailing a copy of same to his address of 770 North Street, Baton Rouge, Louisiana, postage prepaid, and properly addressed.

Lafayette, Louisiana, this ____ day of July, 1975.

_____

J. MINOS SIMON

In the United States Court of Appeals
For the Fifth Circuit

No. 74-3369
*Summary Calendar

ALLEN G. CONQUE,
Plaintiff-Appellant,
versus

HAROLD GAUTHE, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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(March 14, 1975)

Before WISDOM, BELL and CLARK, Circuit Judges.

PER CURIAM:

This case arises out of the Lafayette Parish School Board's transfer of Allen G. Conque from the position of general science teacher and assistant coach to the position of general science teacher at Carencro High School. Conque, who continues to be employed as a science teacher at Carencro, brought this Section 1983 action to enjoin his employers from relieving him of

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

his position as coach and to compel them to reinstate him in that position. The theory of his Section 1983 claim is that his removal was based on "scandalous and defamatory accusations" and that he was entitled to a hearing.

The district judge granted summary judgment for the defendants. Judge Putnam found that Conque had no property right at stake in his position as coach because he had neither tenure in that position nor expectation of continued employment. Moreover, the "scandalous and defamatory accusations" were not such as to deprive him of liberty. That fact is clear from his continued employment as a science teacher at Carencro High School. See Board of Regents v. Roth, 1972, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548; Perry v. Sindermann, 1972, 407 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570, Robinson v. Jefferson County Board of Education, 5 Cir. 1973, 485 F.2d 1381; Ferguson v. Thomas, 5 Cir. 1970, 430 F.2d 852.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

ALLEN CONQUE

versus C.A. No. 74-166

HAROLD GAUTHE, et al

(Filed: Aug. 21, 1974)

RULING ON MOTIONS FOR SUMMARY JUDGMENT

This case arises out of the dismissal of plaintiff as assistant coach at Carencro High School, in the parish of Lafayette. In our ruling of May 23, 1974, on defendants' motion to dismiss, we concluded that under the express terms of the Louisiana Teacher Tenure Act, LSA-R.S. 17:441 et seq., the position of coach or assistant coach is not protected and plaintiff is to be considered for purposes of our decision as a nontenured teacher. His expectancy of re-employment does not rise to the level of a Constitutionally protected property right falling within the due process clause of the Fourteenth Amendment. *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Thaw v. Board of Instruction, Dade County*

Florida, et al, 432 F. 2d 98 (5 Cir. 1970); *Skidmore v. Shamrock Ind. School District*, 464 F. 2d 605 (5 Cir. 1972); *Robinson v. Jefferson County Board of Education*, 485 F. 2d 1381 (5 Cir. 1973); *Collins v. Wolfson, et al*, No. 73-3381 (5 Cir. 1974, not yet reported); Cf. *Womer v. Hampton, et al*, No. 73-1494 (5 Cir. 1974, not yet reported).

We held open the question of whether or not the action of the defendants in dismissing plaintiff could be sustained as a deprivation of plaintiff's liberty without due process, because, on the face of the pleadings it appeared that such a possibility existed if the charges contained in a letter addressed to the Superintendent by Mr. Dugas, principal of Carencro High School, were in fact the basis for his dismissal. The matter is again before us on cross-motions for summary judgment.

It now appears from the affidavit of the defendant Superintendent and School Board members that plaintiff was appointed assistant coach at Carencro High during the 1971-72 school year. He holds the position of classroom teacher in general science at that school, under tenure. The coaching job pays $133.33 per month in addition to his regular teacher's salary. The situation on the coaching staff at this school became difficult during plaintiff's first year in this extra assignment. While the affidavits do not set out specific facts, it is undisputed that the Superintendent had received complaints from the principal as early as February, 1972, and on February 21 of that year met with plaintiff, the principal and the other coaches at the school, with eight members of the

Board, and discussed the problems in depth. Plaintiff was continued as assistant coach during the 1972-73 term, over the objection of the principal who recommended his transfer from the school by letter dated June 6, 1972. Throughout this period and during 1973 the Superintendent held several discussions with the parties, and there is no doubt in the mind of the Court that plaintiff was aware of the complaints against him.

Finally, by letter dated June 1, 1973, Mr. Dugas wrote the letter plaintiff contends was the basis for his discharge. Plaintiff characterizes this document as containing "scandalous and defamatory false allegations damaging of your complainant's reputation as a person and as a member of the teaching profession, involving questions of moral turpitude, insubordination, unprofessionalism and professional incompetency." We do not believe the letter goes so far. It sets out numerous incidents that the principal observed himself as illustrative of the conduct of plaintiff *as a coach*, which the writer believed to be causing division among students and staff.

The undisputed facts are that a situation arose at Carencro High after plaintiff's coaching assignment, that this situation was attributed to plaintiff, that the Superintendent and a majority of the School Board have attempted to mediate the personality differences, that the principal's recommendation at the end of 1972 was rejected and the efforts to mediate continued, and that as a result the Superintendent finally recommended the "transfer" of Mr. Conque from "Head Track Coach/ Asst. Coach/ General Science to General

Science — Carencro High", which was acted upon at the Board's meeting of July 18, 1973. The reasons were set out in the Superintendent's letter recommending this step to the Board in letter dated June 22, 1973, approved by twelve of the thirteen members of the Board then present.

In this respect, the defendant Board members acted officially as Board members, the only manner by which this reassignment could be made under the laws of this state. This case does not involve questions of race, sex or religion. There is no showing whatsoever of any purposeful discriminatory act by any Board member individually, and suit against the Board itself will not lie. *City of Kenosha v. Bruno, et al*, 412 U.S. 507, 93 S.Ct. 2222, 37 L. Ed. 2d 109 (1973); *Moor v. County of Alameda*, 411 U.S. 693, 93 S. Ct. 1785, 36 L. Ed. 2d 596 (1973). That which cannot be done directly will not be allowed indirectly.

Since *Sindermann* and *Roth*, supra, it is clear that not all rights to liberty enjoyed by citizens in public employment are protected by the due process clause of the Fourteenth Amendment. It is where the State's action is such as to label the individual with a "badge of disgrace", under charges against him of dishonesty or immorality, habitual drunkenness, or similar stigmata of a degrading and debasing nature that due process must be afforded even to nontenured employees. *Collins, et al v. Wolfson, et al*, supra, ___ F. 2d ___, at 6824 (5 Cir. 1974, not yet reported), and cases cited above. That this is not the case here is demonstrated by the fact that Mr. Conque is retained even today as a classroom teacher of general science at

Carencro High School. This is his field of professional certification.

For the foregoing reasons, plaintiff's motion for summary judgment is denied, and the motion of the defendants is granted.

It is accordingly ORDERED that plaintiff's suit brought under 42 U.S.C.A. §§ 1983, 1988 and 28 U.S.C.A. § 1331(3), (4), be and the same is hereby dismissed.

Lafayette, Louisiana, August 21, 1974.

/s/ R. J. PUTNAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

CIVIL ACTION
NO. 74-166

ALLEN G. CONQUE

versus

HAROLD H. GAUTHE, et al

(Filed: May 23, 1974)

FOR PLAINTIFF
Messrs.
J. Minos Simon
Post Office Box 52116, O.C.S.
Lafayette, Louisiana 70501

FOR DEFENDANTS
John F. Ward, Jr.
770 North Street
Baton Rouge, Louisiana 70802

R. J. PUTNAM, DISTRICT JUDGE

RULING ON MOTIONS

Plaintiff is a general science teacher at Carencro High School, one of the public schools of Lafayette Parish. He has been a certified teacher in this public school system for more than three years, and as such falls within the protection of the Louisiana teacher tenure law, as a certified teacher of general science. LSA-R.S. 17:441 et seq. Defendants are all of the members of the Lafayette Parish School Board, except one, Preston J. Babineaux, who is not named in the suit: Harold Gauthe, Superintendent of Schools and Allen A. Dugas, principal of Carencro High School, plaintiff's superior.

Jurisdiction is claimed under Title 28 U.S.C. §§ 1343(3)(4), 2281 and 2284, and Title 42 U.S.C. § 1983 and 1988, and the prayer is for a three-judge court for alleged constitutional infirmities in the teacher tenure law of this state, among other things.

We have before us at this time the question of (1) whether or not a substantial constitutional question is involved such as to warrant the extraordinary procedure of a three-judge court, and (2) defendants' motion to dismiss for failure to state a claim. Plaintiff also filed a motion for summary judgment on May 2, 1974, which was set by special order for hearing on May 8. Since the 20-day delay provided for by Rule 56, F.R.C.P. 28 U.S.C. has not elapsed, we withhold action on this issue pending a written waiver of the delays by counsel for defendants.

The allegations of fact set forth in the complaint must be taken as true, and if plaintiff can prevail under any view of such facts the motion to dismiss must be denied. These allegations are to the effect that:

1. In addition to his position as a classroom teacher in his field of certification, he was employed as assistant coach at Carencro High School, for which he was compensated at the rate of $133.33 per month.

2. He was discharged from the coaching position effective July 1, 1973.

3. The discharge was based upon "scandalous and defamatory false allegations" contained in a letter from his principal, Allen Dugas, to defendant Gauthe, dated June 1, 1973, a copy of this letter being attached to the complaint.

4. That petitioner requested and was denied a pretermination due process hearing, in violation of rights to property and liberty secured to him by the Fourteenth Amendment of the Constitution of the United States.

I

We consider first the question of whether or not the constitutionality of the Louisiana tenure law is properly before us, and, if so, whether the attack leveled against it presents a substantial constitutional claim. We conclude that it does not and that a three-judge court is inappropriate.

Conque admits in brief (p. 2) that he did not acquire tenure in the position from which he was removed. This is true. The term "teacher" as used in the tenure law is defined as follows:

> "As used in this sub-part, the word "teacher" means any employee of any parish or city school board who holds a teachers certificate and whose legal employment requires such teacher's certificate."

There is no requirement that a coach hold a teacher's certificate disclosed by our independent research, and plaintiff cites no statute, regulation or express policy requiring that persons so employed be certificated. He cites discussions of Louisiana courts in *State v. Cameron Parish School Board*, 202 So. 2d 34 (La. App. 1962). *State ex rel DeBarge v. Cameron Parish School Bd.* (La. App. 1967), writ refused 251 La. 386, 204 So. 2d 572; *Charbonnet v. Jefferson Parish School Board*, 188 So. 2d 143 (La. App. 1966), relative to teachers in the system who had been promoted to principal and then removed without a hearing from the new position prior to the expiration of three years. There plaintiffs had all acquired tenure as teachers prior to promotion, *and a teaching certificate is required for the position. DeBarge*, supra, 202 So. 2d at 36.

The precise question here has never been presented to the Louisiana courts. The analogy to an employee's "status" as a principal is not valid, since coaches are not required to be certified. For the purposes of asserting a protected right to property, we cannot say that the law of Louisiana, from which such a right

must flow, affords this interest to coaches who serve without tenure. We do not now undertake to decide this question as a matter of state law. In an area where the interests of the state in relation to its teachers must be delicately weighed and balanced,[1] were it necessary to do so, this court would abstain as suggested by the concurring opinion of Mr. Chief Justice Burger in *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); 33 L. Ed. at 581. Cf. *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972), *Sindermann's* contemporary forerunner.

Our conclusion on this issue is that a three-judge court is not required, because under the alleged facts it is not necessary to reach the issue.

II

Board of Regents v. Roth, supra, and *Perry v. Sindermann*, supra, carefully spell out the bounds within which even a nontenured teacher may be entitled to a due process pretermination hearing. In this case, the letter addressed by Mr. Dugas to the Superintendent of Schools levels a number of charges against plaintiff which, if they were in fact the basis for his dismissal as assistant coach, would bring him within the Fourteenth Amendment's procedural protection of his liberty as that term is employed in this provision of our basic law.

> "While this Court has never attempted to define with exactness the liberty . . . . guar-

1 See, for example, Pickering v. Board of Education, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

> anteed [by the Fourteenth Amendment] the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men . . . (citations omitted).
>
> "There might be cases in which a State refused to re-employ a person under such circumstances that interests in liberty would be implicated. But this [Roth] is not such a case.
>
> "The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. *Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor or integrity is at stake because of wnat the government is doing to him, notice and an opportunity to be heard are essential,' . . .* (citations omitted) *. . . In such a case, due process would accord an opportunity to refute the charge before Uni-*

versity officials." Board of Regents v. Roth, supra, 33 L. Ed. 2d at 558 (emphasis supplied).

In the case at bar, the letter alleged to be the basis for petitioner's discharge, at the very least, charges Conque with professional incompetence.[2] One Louisiana court has recognized the import of such a charge against a teacher in these words:

> "While the School Board has the right, ordinarily, to transfer Relator from his position as Principal of East Jefferson High School to that of Supervisor of Child Welfare and Attendance . . . his appointment to such office does not make moot his removal from the position of Principal . . . on the ground of incompetency, since such cause for removal, unless nullified by this court, *would constitute a permanent degrading of Relator and a blot on his record.*" State ex rel Charbonnet v. Jefferson Parish School Board, supra, 188 So. 2d at 145. (Emphasis supplied.)

Roth and *Sindermann*, supra, contain exhaustive reviews of the authorities. The principle is a logical consequence of the doctrine of *Roth* and *Sindermann*, supra, and has been recognized by the Fifth Circuit Court of Appeals in *Moore v. Knowles*, 482 F. 2d 1069 (1973), by way of dicta, while the Eighth Circuit, in *Wilderman v. Nelson*, 467 F. 2d 1173 (1972) has ex-

2 It is not necessary to reiterate these charges in this opinion. We take judicial notice of the fact that there has already been considerable publicity in the area concerning this controversy, and direct the attention of all attorneys to DR 7-107, A.B.A. Code of Professional conduct for future reference.

pressly applied it. The cases relied upon by defendants in this case did not deal with a situation where express charges were made against the nontenured teacher impinging upon his right to liberty under the Fourteenth Amendment, but rather turn on the point that they had no property interest in re-employment that was subject to protection.[3]

We cannot, therefore, grant defendants' motion to dismiss. The motion for summary judgment is held over pending the information requested of defendants' attorney as stated above.

IT IS SO ORDERED.

Lafayette, Louisiana, May 23, 1974.

/s/ R. J. PUTNAM
United States District Judge

3 We make no ruling on the merits, which must follow factual evidence on the accuracy of plaintiff's allegations. We do direct the attention of all parties to footnote 12 in *Roth*, supra, 33 L. Ed. 2d at 558, 559, nor do we now determine the procedural aspects of the hearing to which plaintiff may be entitled, although the procedure outlined in LSA-R.S. 17:442 et seq. suggests itself as a logical vehicle.

United States District Court
Western District of Louisiana
Lafayette Division

ALLEN G. CONQUE

versus

HAROLD GAUTHE, HERMAN C. CLAUSE STANLEY P. BABIN, J. MAXIE BROUSSARD, GEORGE F. DUPUIS, SR., DANIEL AUCOIN, DR. R. A. BARANCO, J. STEWART BONNET, JESSIE BOUDREAUX, JR., JEROME J. BOURQUE, ALTON CHASSION, DUDLEY LASTRAPES, JR. CHARLES S. PATTERSON, EARL VALLOT and ALLEN A. DUGAS

ORIGINAL COMPLAINT

JURISDICTION

The jurisdiction of this Court is invoked under Title 42, U.S.C.A., Sections 1983 and 1988; Title 28, U.S.C.A., Sections 1343(3)(4), 2281 and 2284.

PRELIMINARY STATEMENT

Complainant, Allen G. Conque, for more than three years preceding the wrongful conduct mentioned herein, has been a teacher of general science in the public school system of Louisiana in Lafayette Parish, Louisiana, employed by the Lafayette Parish School Board. According to the Teacher Tenure Act of Louisiana (R.S. 17:441, et. seq.) each teacher must serve a probationary term of three years to be reckoned from the date of his first appointment in any parish

in the State of Louisiana. In the absence of discharge during such probationary period, such a probationary teacher automatically becomes a regular and permanent teacher in the employ of the school board of the parish of employment where he has successfully served his three-year probationary term. Thereafter such a teacher cannot be removed from office except upon written and signed charges of willful neglect of duty, or incompetency or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At any such hearing for removal, the teacher is entitled to have witnesses testify on his behalf and to the assistance of counsel and also enjoys the right of appeal to a court of competent jurisdiction. As a prerequisite to employment as a teacher in the public school system of Louisiana, a teacher must possess a teacher's certificate recognized and/or issued by the State Board of Education. Complainant possesses such a certificate.

Complainant further states that as a concomitant part of his duties as a teacher, he was employed by the Lafayette Parish School Board during the 1972-73 school session as assistant coach at the Carencro High School of Lafayette Parish, Louisiana, a school forming part of the public school system of Lafayette Parish, Louisiana. For his services as assistant coach at the Carencro High School aforesaid, he was entitled to and did receive compensation at the rate of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33)

DOLLARS monthly in addition to the compensation which he received as a teacher of general science. Complainant further alleges that he was discharged from his position as assistant coach as hereinaforesaid effective July 1, 1973, and this discharge forms the central issue in controversy in this litigation.

IDENTITY AND STATUS OF PARTIES DEFENDANT

At all times material hereto Herman C. Clause, Stanley P. Babin, J. Maxie Broussard, George F. Dupuis, Sr., Daniel Aucoin, R. A. Baranco, J. Stewart Bonnet, Jessie Boudreaux, Jr., Jerome J. Bourque, Alton Chassion, Dudley Lastrapes, Jr., Charles S. Patterson and Earl Vallot were and continue to be members of the Lafayette Parish School Board and as such state officials with full authority to hire and fire teachers in connection with the educational system of the State of Louisiana, Parish of Lafayette, Louisiana; Harold H. Gauthe at all times material hereto was the superintendent and/or acting superintendent of the Lafayette Parish School Board, being essentially the executive officer of the Lafayette Parish School Board charged with the responsibility of superintending the operations of all public schools in Lafayette Parish, including the teachers in such school system; Allen A. Dugas at all times material hereto was the principal of Carencro High School of Lafayette parish, Louisiana.

WRONGFUL ACTS OF DEFENDANTS

Complainant alleges that defendants herein, while acting in concert and under color of state law and ar-

bitrarily exercising the power possessed by each by virtue of such state laws removed your complainant from the position of assistant coach effective July 1, 1973. Complainant states that said removal was based upon scandalous and defamatory false allegations damaging of your complainant's reputation as a person and as a member of the teaching profession, involving questions of moral turpitude, insubordination, unprofessionalism and professional incompetency.

Complainant states that his discharge was based upon false and scandalous allegations and accusations articulated by defendant Allen A. Dugas and communicated to defendant Gauthe by said Dugas in a letter dated June 1, 1973, a copy of which is annexed hereto and made part hereof. The defendants herein willfully accepted the scandalous ex parte statements of the said Dugas and others unknown to your complainant without regard to the truthfulness thereof and without making reasonable inquiry as to the verity of the scandalous statements made against your complainant. Said defendants refused to conduct a hearing or even to extend to complainant an opportunity for a hearing for the purpose of determining the truthfulness or not of the scandalous allegations and accusations asserted against complainant herein, notwithstanding that one of the members of the School Board, Mr. Preston J. Babineaux, made a formal motion requesting that said scandalous accusations be the subject of inquiry and full hearing.

Contrariwise defendants herein by concerted and unilateral action adjudicated your complainant guilty of the scandalous conduct hereinaforesaid and

thereupon condemned your complainant as professionally unfit and unqualified for the position of assistant coach of Carencro High School and dismissed him and removed him from said position and simultaneously deprived him of his income of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month as hereinaforesaid.

Complainant further states that there exists no valid reason for the termination of his said employment. That his employment as hereinaforesaid was terminated without meaningful inquiry, without supporting proof and without any hearing whatever. As a consequence of the conduct of the defendants herein, your complainant has been deprived and denied of his right of employment and of his right to a good professional repute without any valid reason whatever, without any hearing and without giving him the opportunity to be heard and to defend against the scandalous charges in violation of his rights, privileges and immunities secured to him by the Fourteenth Amendment to the United States Constitution.

L.S.A.-R.S. 17:441 et seq.
AND PARTICULARLY SECTION 442 THEREOF
IS UNCONSTITUTIONAL

Complainant further alleges that he is informed, believes and therefore states that the defendants herein acted in purported reliance upon the provisions of the Teachers Tenure Act of Louisiana known as L.S.A.-R.S. 17:441 et seq. and particularly Section 442 thereof in discharging and dismissing

your complainant without a hearing and without just cause; Section 442 of said State law reads as follows:

> "Each teacher shall serve a probationary term of three years to be reckoned from the date of his first appointment in the parish or city in which the teacher is serving his probation. During the probationary term the city school board, as the case may be, may dismiss or discharge any probationary teacher upon the written recommendation of the parish or city superintendent of schools, as the case may be, accompanied by valid reasons therefor.
>
> "Any teacher found unsatisfactory by the parish or city school board, as the case may be, at the expiration of the said probationary term, shall be notified in writing by the board that he has been discharged or dismissed; in the absence of such notification, such probationary teacher shall automatically become a regular and permanent teacher in the employ of the school board of the parish or city, as the case may be, in which he has successfully served his three year probationary term; all teachers in the employ of any parish or city school board as of July 31, 1946, who hold proper certificates and who have served satisfactorily as teachers in that parish or city for more than three consecutive years, are declared to be regular and permanent teachers in the employ of the school board of that parish or city."

As interpreted and as applied said state law does not require an evidentiary hearing or an opportunity for a hearing on the part of a teacher dismissed, removed or demoted where tenure in the position involved is not secured such as was the case of your complainant herein in respect to his position as assistant coach of Carencro High School; said state law, however, to the extent that it may be interpreted to sanction the discharge and dismissal of your complainant as herein alleged is unconstitutional null and void for two substantial reasons, viz., (a) it denies to complainant and those similarly situated property without due process of law and (b) it is both unconstitutionally vague and overbroad forasmuch as the "valid reasons" authorizing a discharge without a hearing are not defined nor are there any standards established by which the meaning of such a term may be understood by reasonable persons.

Complainant states that he is entitled to injunctive relief against defendants herein prohibiting them from depriving and continuing to deprive him of his constitutional right not to be discharged or terminated as assistant coach of Carencro High School without valid reasons and of his constitutional right not to be discharged and terminated as assistant coach and deprived and denied of his good repute without valid reasons and without constitutional due process. Complainant further states that he is entitled to be reinstated as assistant coach at Carencro High School aforesaid retroactive to the date of his wrongful discharge and removal together with all of the emoluments of said position including the right to compensation at the rate of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month.

WHEREFORE complainant respectfully prays that upon the filing of this complaint, as may appear fitting and proper to the Court:

(1) That a statutory three-judge district court be convened pursuant to Sections 2281 and 2284 of Title 28, U.S.C.A.;

(2) enter a final judgment, order and decree that will declare LSA-R.S. 17:441 et seq., and particularly Section 442, unconstitutional, null and void as a matter of law and as applied;

(3) enter a permanent injunction that will enjoin and restrain defendants, their agents, servants, representatives and employees and their successors in office and all persons acting for or with them forever from enforcing against complainant said state statute declared unconstitutional and further enjoining, restraining and prohibiting the defendants herein from continuing and/or maintaining the removal and dismissal of your complainant as assistant coach of Carencro High School without a meaningful hearing as contemplated by the due process clause of the Fourteenth Amendment to the United States Constitution;

(4) enter a final order, decree or judgment commanding and directing defendants herein to reinstate your complainant as

assistant coach of Carencro High School, Louisiana, retroactive to the date of his wrongful dismissal or removal on July 1, 1973, together with all of the emoluments, rights and privileges, including compensation due from July 1, 1973, at the rate of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month, and to continue him in said capacity and in said employment thereafter subject to removal but only for valid cause and after a meaningful hearing as contemplated by the due process clause of the Fourteenth Amendment to the United States Constitution.

COMPLAINANT FURTHER PRAYS for such additional orders or decrees as shall be authorized and proper in the premises.

J. MINOS SIMON
Attorney for Plaintiff
1408 Pinhook Road
Post Office Box 52116, OCS
Lafayette, Louisiana 70501

/s/ J. MINOS SIMON
J. MINOS SIMON

United States District Court
Western District of Louisiana
Lafayette Division

ALLEN G. CONQUE

versus No. 74,166-L

HAROLD GAUTHE, HERMAN C. CLAUSE, STANLEY P. BABIN, J. MAXIE BROUSSARD, GEORGE F. DUPUIS, SR., DANIEL AUCOIN, DR. R. A. BARANCO, J. STEWART BONNET, JESSIE BOUDREAUX, JR., JEROME J. BOURQUE, ALTON CHASSION, DUDLEY LASTRAPES, JR., CHARLES S. PATTERSON, EARL VALLOT and ALLEN G. DUGAS

MOTION FOR SUMMARY JUDGMENT

ALLEN G. CONQUE, appearing through counsel, respectfully moves for summary judgment in his favor as to the relief prayed for in numbered Paragraphs 3 and 4 of his prayer, forasmuch as there exists no substantial dispute of fact materially related to the controversy presented by this lawsuit as to such relief and that as a matter of law, plaintiff is entitled to judgment as prayed for therein.

J. MINOS SIMON
Attorney for Plaintiff
1408 Pinhook Road
Post Office Box 52116 OCS
Lafayette, Louisiana 70501

/s/ J. MINOS SIMON
J. MINOS SIMON

AFFIDAVIT

On this 11th day of June, 1974, personally came and appeared before me, the undersigned authority, duly authorized and qualified in and for the Parish of Lafayette, State of Louisiana,

HERMAN C. CLAUSE, J. MAXIE BROUSSARD, DANIEL AUCOIN, DR. R. A. BARANCO, J. STEWART BONNET, JESSIE BOUDREAUX, JR., ALTON CHAISSON, DUDLEY LASTRAPES, JR.,

residents of the Parish of Lafayette, who, after being by me first duly sworn, did depose and say:

That each of them is a member of the Lafayette Parish School Board and that they make this affidavit for use in that certain suit entitled "Allen G. Conque v. Harold Gauthe, et al," No. 74-166-L on the docket of the United States District Court, in opposition to plaintiff's motion for summary judgment filed therein and in support of a motion for summary judgment filed by defendants.

That each of them was a member of the Lafayette Parish School Board on July 18, 1973 when the Superintendent of Schools, Mr. Harold H. Gauthe, recommended that Mr. Allen G. Conque be relieved of his coaching duties at Carencro High School although being retained at Carencro High School as a classroom teacher. Their vote to sustain the Superintendent's recommendation to relieve Mr. Conque of his coaching duties was based upon

Superintendent Gauthe's recommendation as contained in his letter of June 22, 1973, directed to Mr. Conque, copies thereof having been given to each affiant herein, and on affiants' conclusion that it was in the best interest of the Lafayette Parish school system and the athletic program at Carencro High School that Mr. Conque be retained at such school as a classroom teacher without any coaching duties or responsibilities.

As Mr. Conque was not being dismissed or demoted as a teacher in the Lafayette Parish school system but merely having his duties reassigned, his reassignment was included on a list of personnel changes at the July 19, 1973, metting. (See Exhibit E, Page 3)

When the agenda item of personnel changes came up, Mr. Conque and a group of his friends and supporters were present at the Board meeting and Mr. Conque and several of his supporters were recognized and heard by the Board prior to its vote to approve "the recommended personnel changes" which motion carried by a vote of twelve (12) to one (1) with one (1) member absent. (See Exhibit F, Page 4)

It was only after consideration of a Superintendent's recommendation as set forth above and a hearing from Mr. Conque and others that affiants concluded that it was in the best interest of the Lafayette Parish school system to reassign Mr. Conque's duties at the Carencro High School.

/s/ HERMAN C. CLAUSE
Herman C. Clause, Board Member

/s/ J. MAXIE BROUSSARD
J. Maxie Broussard, Board Member

/s/ DANIEL AUCOIN
Daniel Aucoin, Board Member

/s/ DR. R. A. BARANCO
Dr. R. A. Baranco, Board Member

/s/ J. STEWART BONNET
J. Stewart Bonnet, Board Member

/s/ JESSE BOUDREAUX, JR.
Jesse Boudreaux, Jr., Board Member

/s/ ALTON CHASSION
Alton Chassion, Board Member

/s/ DUDLEY LASTRAPES, JR.
Dudley Lastrapes, Jr., Board Member

Sworn to and subscribed before me this 11th day of June, 1974.

/s/ EARL A. BULLER
Notary Public

STATE OF LOUISIANA
PARISH OF LAFAYETTE

ALLEN G. CONQUE, being first duly sworn, did depose and say that for more than three years preceding the filing of the captioned lawsuit he has been a teacher of General Science in the public school system of Louisiana in Lafayette Parish, Louisiana, employed by the Lafayette Parish School Board and thus pursuant to the Teacher Tenure Act of Louisiana he enjoyed tenure in such a position.

Affiant further states that as a concomitant part of his duties as a teacher he was employed by the Lafayette Parish School Board during the 1972-73 school session as assistant coach at the Carencro High School of Lafayette, Louisiana, a school forming part of the public school system of Lafayette Parish, Louisiana. For his services as assistant coach at the Carencro High School aforesaid, he was entitled to and did receive compensation at the rate of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS monthly in addition to the compensation which he received as a teacher of General Science.

Affiant further states that Herman C. Clause, Stanley P. Babin, J. Maxie Broussard, George F. Dupuis, Dr., Daniel Aucoin, R. A. Baranco, J. Stewart Bonnet, Jessie Boudreaux, Jr., Jerome J. Bourque, Alton Chassion, Dudley Lastrapes, Jr., Charles S. Patterson and Earl Vallot were at all times material to this lawsuit and continue to be members of the Lafayette Parish School Board and as such state officials have the authority to hire and fire teachers in

connection with the educational system of the State of Louisiana in Lafayette Parish, Louisiana, and Harold H. Gauthe at all times material to this lawsuit was the superintendent and/or acting superintendent of the Lafayette Parish School Board, being essentially the executive officer of the Lafayette Parish School Board charged with the responsibility of superintending the operations of all public schools in Lafayette Parish, including the teachers in such school system. Allen A. Dugas at all times material hereto was the principal of Carencro High School of Lafayette Parish, Louisiana.

Affiant states that defendants herein, while acting in concert and under color of state law and arbitrarily exercising the power possessed by each by virtue of said state laws removed affiant from the position of assistant coach effective July 1, 1973. Said removal was based upon scandalous and defamatory false allegations damaging of your affiant's reputation as a person and as a member of the teaching profession, involving questions of moral turpitude, insubordination, unprofessionalism, and professional incompetency. The basis for the discharge in question was the false and scandalous allegations and accusations articulated by Allen A. Dugas and communicated to Harold Gauthe by said Dugas in a letter dated June 1, 1973, a copy of which is annexed to and made a part of the original complaint hereof. Affiant states that defendants herein willfully accepted the scandalous ex parte statements of said Dugas and others unknown to your affiant without regard to the truthfulness thereof and without making reasonable inquiry as to the verity of the scandalous statement made against affiant. Affiant further states that said

state officials refused to conduct a hearing or even to extend to affiant an opportunity for a hearing, though affiant requested the same, for the purpose of determining the truthfulness or not of the scandalous allegation and accusations asserted against your affiant, notwithstanding that one of the members of the school board, Mr. Preston J. Babineaux, made a formal motion requesting that said scandalous accusation be the subject of formal inquiry and full hearing by the Lafayette Parish School Board.

Affiant further states that the scandalous allegations and accusations mentioned herein above are not true. As a result of said discharge, your affiant was removed from the position of assistant coach, which formed part of his status as a teacher, and also was deprived of the sum of ONE HUNDRED THIRTY-THREE AND 33/100 ($133.33) DOLLARS per month since July 1, 1973, and has continuously been deprived of said income as a result of the wrongful conduct of the defendants in connection with the captioned matter.

/s/ ALLEN G. CONQUE
ALLEN G. CONQUE

SWORN TO AND SUBSCRIBED before me, Notary Public, on this 30th day of April, 1974, at Lafayette, Louisiana.

/s/ LOUIS M. CORNE
NOTARY PUBLIC

COUNTER AFFIDAVIT

STATE OF LOUISIANA
PARISH OF LAFAYETTE

ALLEN G. CONQUE, first being duly sworn did depose and say that he is the plaintiff in that certain suit entitled "Allen G. Conque vs. Harold Gauthe, et al" bearing Docket Number 74-166-L on the docket of the United States District Court. Affiant further states that on one occasion he has met with the then acting superintendent of the Lafayette Parish School Board Harold Gauthe, Principal of Carencro High School Dugas and some School Board members but at no time has he been given an opportunity to present witnesses and be heard in defense of allegations of incompetency, insubordination and incompatibility with the coaching staff as alleged by Principal Dugas and Superintendent Gauthe. Affiant states that on July 18, 1973, he was present at a school board meeting and requested to be heard on his removal from duties as coach but the School Board, despite a motion by one of its members refused affiant any hearing and in fact the only discussion affiant was allowed was that of whether or not he would be given the requested hearing. Affiant states that at no time did he present witnesses to the School Board nor was he allowed any opportunity to attempt to refute the charges against him. Affiant further states that at no time has he ever been given an opportunity to challenge the charges against him nor given a meaningful hearing wherein he was able to present witnesses and cross examine accuser on the charges against him. Affiant states that he has met on one occasion with Superintendent

Gauthe and Principal Dugas along with others who have criticized him and made scandalous charges against him, but at no time has he ever been given the opportunity to attempt to disprove these charges in a meaningful hearing.

Affiant states that at no meeting held between him and Superintendent Gauthe and Principal Dugas were the charges set forth in Principal Dugas's letter to Superintendent Gauthe of June 1, 1973, ever discussed.

/s/ ALLEN G. CONQUE
ALLEN G. CONQUE

SWORN TO AND SUBSCRIBED before me on this 12th day of July, 1974.

/s/ JOHN R. MOUTON
NOTARY PUBLIC

Exhibit D

June 22, 1973

Mr. G. Allen Conque
Rt. 2, Box 229E
Lafayette, Louisiana

Dear Mr. Conque:

During the 1972-73 school session, you were assigned to Carencro High School as a teacher of general

science (a tenured position) and an assistant coach (a non-tenured position).

For several years, there have been numerous controversies concerning the manner in which you functioned as a member of the total coaching staff. The situation has become so aggravated that several hearings on the problem have been held. Attempts to work the probelm out have failed.

This is to inform you that due to your apparent incompatibility to function as a member of a total coaching staff and your sometime insubordinate attitude and upon the recommendation of the principal of Carencro High School and my review of the testimony brought out at the several hearings, you are hereby removed as an assistant coach and will remain assigned as a classroom teacher at Carencro High School for the 1973-74 school session. This change in your status is effective July 1, 1973.

Sincerely yours,

LAFAYETTE PARISH SCHOOL BOARD

Harold H. Gauthe, Acting Superintendent

HHG:mbg

cc: Mr. Allen Dugas, Principal
Lafayette Parish School Board Members